

Legislator Per Diem Payments -- Tax Considerations
Lee Heiman, Staff Attorney
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This information is intended to assist legislators and their tax preparers in handling legislative per diem payments. Legislators should consult with their income tax preparers for specific requirements relating to individual circumstances.

General Rules

All legislator per diem payments not exceeding the amount allowed by federal law that are made to legislators living more than 50 miles from the capitol building are reimbursements made under an accountable plan, are not taxable income of the legislator, and are not subject to withholding or reporting. The difference between the amount allowed by federal law for reimbursement and the actual amount of per diem paid is taxable income.

Legislator per diem payments made to legislators who do not live in Helena but who live within 50 miles of the capitol building are not substantiated reimbursements and are thus reported as income. Withholding is made against these payments. All legislative lodging and meal expenses actually incurred by a non-Helena legislator living within 50 miles of the capitol building are unreimbursed expenses and, subject to certain limitations, may be a miscellaneous items deduction by the legislator.

Legislator per diem payments made to legislators who reside in Helena are reported as income and are subject to withholding. The legislator may not claim meal and lodging

expenses incurred in Helena.

Discussion

Accountable Plan

All legislator per diem payments made to a legislator whose home is more than 50 miles from the capitol building are employee reimbursements under an accountable plan for the following reasons:

(1) Under 26 U.S.C. 162(h), a legislator is considered to have substantiated living expenses if the legislator's place of residence is more than 50 miles from the capitol building.

(2) Federal law provides one type of accountable plan for when the employee's "lodging plus meals and incidental expenses" per diem reimbursement is substantiated (26 U.S.C. 62(a)(2)(A), 26 CFR 1.62-2(c)(2)).

Excess Per Diem Payment

The amount considered substantiated under federal law cannot exceed the amount payable to federal employees for per diem within the U.S. For Montana, the applicable reimbursement rate, set forth in 41 CFR Ch. 301 App. A, is \$91 a day through September 30 and \$99 a day beginning October 1. The per diem payment made to legislators is \$94.05 per legislative day, set according to 5-2-301(4), MCA.

Reimbursements paid "under an accountable plan are excluded from the employee's gross income, are not reported as wages or other compensation on the employee's

Form W-2, and are exempt from the withholding and payment of employment taxes (Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA). . .)" (26 CFR 1.62-2(c)(4)).

Montana legislators were paid per diem for 108 regular and special session legislative days at \$94.05 per day, for a total of \$10,157.40. 26 U.S.C. 162(h)(2)(A) considers per diem substantiated during legislative session breaks of up to 4 days. Montana law provides for reimbursement only on breaks of 3 days. During the regular session there was a 5-day break on February 24 through 28 and a 4-day break on March 25 through 28. State per diem was paid for 3 days during the February break, but because the break exceeded 5 days, federal law did not consider the payment as substantiated per diem. For the March break per diem was paid for 3 days, but 4 days were allowable under federal law. Federal law then allows substantiation of 104 regular session days at \$91 a day and 2 special session days at \$99 a day for a total of \$9,662. A total of \$495.40 (\$10,157.40 - \$9,662) was paid in excess of substantiated business expenses.

Therefore, although all legislators living more than 50 miles from the capitol building do not have their per diem payments reported on their W-2 Forms, they must pay taxes on the \$495.40 that is in excess of the amount considered substantiated under federal law.

Helena Area Legislators

Under 26 U.S.C 162(h)(4), the special provisions allowing use of the federal per diem rate do not apply to legislators living within 50 miles of the capitol building. Therefore,

those legislators must follow the provisions of 26 U.S.C. 274(d) and must specifically substantiate all lodging and meal expenses. Because 26 U.S.C. 274(d) requires out-of-town travel before a person can claim lodging and meal expenses, a legislator who lives in Helena cannot claim any meal or travel expenses for session activities occurring within Helena.

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